



**Thiong'o & another v Kaminchia & 2 others (Environment & Land Case E346 of 2022) [2024] KEELC 3622 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E346 OF 2022**

**EK WABWOTO, J  
APRIL 30, 2024**

**BETWEEN**

**GEOFFREY MUNGAI THIONG'O ..... 1<sup>ST</sup> PLAINTIFF**

**ANTHONY THAIRU NGUGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALEXANDER T. KAMINCHIA ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**KEN KIRIGIA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The instant suit was commenced vide a plaint dated 6<sup>th</sup> October 2022 which was subsequently amended on 31<sup>st</sup> October 2022. The Plaintiffs herein have sought the following reliefs: -
  - i. A declaration that the Plaintiffs are the lawful registered proprietors of the suit property known as L.R No. 21932 situated along Lang'ata within the Nairobi City County formerly, Residential plot No. XVII –Nairobi and are entitled to ownership and peaceful occupation of the same to the exclusion of Defendants herein.
  - ii. A permanent injunction against the Defendant prohibiting whether by themselves, agents and/or servants from entering upon, trespassing, remaining upon, transferring, leasing, charging assigning or interfering with the plaintiffs' quiet and peaceful possession of the suit property known as L.R No. 21932 situate along Lang'ata within the Nairobi City county formerly, Residential Plot No. XVII- Nairobi, which order shall be enforced by Officer commanding Lang'ata Police Station.
  - iii. A declaration that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have no legal rights or recognizable interests over the property known as L.R No. 21932 situate along Lang'ata within the Nairobi City County



formerly, Residential Plot No. XVII – Nairobi and any title document he purports to hold relating to the suit property are illegal, null and void and stands revoked and/or cancelled forthwith.

- iv. Costs of the suit.
2. The suit was contested by the Defendants. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants’ filed a Statement of Defence and Counterclaim dated 21<sup>st</sup> November 2022. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants sought the following reliefs in their Counterclaim: -
- i. Declaration that the counter-claimant is the lawful and legitimate proprietor of L.R No. 21932 vide Grant Registered on the 11<sup>th</sup> July 1996.
  - ii. Declaration that the purported certificate of lease issued to and in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the counterclaim is illegal, unlawful and same was procured vide fraud and corrupt practices.
  - iii. The impugned certificate of lease to and in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to the counterclaim be revoked, nullified and cancelled.
  - iv. That the Honourable Court be pleased to issue and grant an order of permanent injunction to restrain and prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the counterclaim either by themselves, agents and/or servants from interfering with the counter-claimant’s rights and interests over and in respect of L.R No. 21932.
  - v. General damages for trespass.
  - vi. Exemplary and aggravated damages for breach and violation of the counter-claimant’s constitutional rights and in respect of the suit property.
  - vii. Special damages on account of the illegal demolitions carried out and undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the counterclaim.
  - viii. Interests on the general damages, aggravated and exemplary damages at court rates.
  - ix. Costs of the suit and the Counterclaim.
3. The 2<sup>nd</sup> defendant filed a statement of defence dated 11<sup>th</sup> January 2023 which was a general denial of the averments made in the Amended Plaintiff.

### **The Plaintiffs’ case**

4. The Plaintiffs averred that they are the joint lawful and registered owners of parcel L.R No. 21932 situated in Nairobi being the suit property herein which was acquired through allocation from the government. It was averred that following the said lawful allocation, they duly complied with all the conditions as to the allocation subsequent to which they were issued with a lease dated 12<sup>th</sup> July 2018 and were later registered by the 2<sup>nd</sup> Defendant herein as lawful joint proprietors of the suit property and issued with a Certificate of Title L.R No.203488 registered on 17<sup>th</sup> December 2018.
5. The Plaintiffs also averred that they are the rateable owners of the suit property currently in possession of the same save for uninterrupted possession and occupation by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants on Friday 26<sup>th</sup> August 2022 at around 4.00pm.
6. During trial, Anthony Thairu Ngugi, the 2<sup>nd</sup> Plaintiff herein testified on behalf of the Plaintiffs. He adopted his witness statement dated 29<sup>th</sup> September 2023 and produced his bundle of documents dated



6<sup>th</sup> October 2022, supplementary bundle dated 6<sup>th</sup> March 2023, further bundle dated 29<sup>th</sup> September 2023 in his evidence in chief. He told the court that the Plaintiffs filed this suit owing to the harassment by the agents of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants specifically in relation to the incidences that occurred in August 2022.

7. It was his testimony that the Plaintiffs applied and were allocated the land vide an application letter dated 13<sup>th</sup> February 1996 which was produced in evidence and the same being at page 40 of the Plaintiff's trial bundle. He also stated that the Plaintiffs upon being allocated the land complied with all the required conditions. Payment was made on 18<sup>th</sup> March 1996 and they were allocated the land after making payment. He also stated that the Plaintiffs took possession immediately upon allocation.
8. It was his testimony that the Plaintiffs were issued with a lease document and a Certificate of Title which was produced in evidence. He also stated that they had put up a mabati structure and had even fenced the property.
9. He further stated that he was aware that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had filed a Statement of Defence and Counter-claim which they had responded to.
10. On cross-examination by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants he stated that the Plaintiff duly complied with all the conditions relating to the allocation of the suit property. He also stated that he was already privy to the location of the suit property at the time of its application.
11. When asked about the address of P.O. Box 456 Nakuru that was indicated in his letter, he stated that the same was a genuine address that used by the Plaintiffs since he did not have his own personal address at that time. He also stated that postal address had been in existence since the year 1956.
12. He further stated that the Ministry had the mandate to allocate land in 1996. He conceded of not having a banker's cheque but stated that he had copies of the receipt that were issued to him. He also stated that he has never seen the 1<sup>st</sup> and 3<sup>rd</sup> Defendants since they took possession of property in 1996 and later got the title in 2013. He also stated that he has been paying rates and rent in respect to the property and the last one was made on 4<sup>th</sup> April 2022.
13. On further cross-examination by Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants he maintained that the Plaintiffs documents are genuine having lawfully acquired the property and that even the current searches show their ownership to the property.
14. On cross-examination by Counsel for the 2<sup>nd</sup> Defendant, he stated that the letter of allotment did not have any reference number for the cheque. He also stated that the President and Ministry of Lands had powers to allocate land in 1996 and that the Ministry did its duty by allocating them land at that time.
15. When re-examined, he reiterated that the Plaintiffs complied with all the conditions of the allotment letter and they confirmed acceptance within 30 days as was stipulated. He also stated that the Plaintiffs documents are genuine since they were issued by the Ministry. He also stated that he had produced in court two gazette notices to prove that the postal address used by the Plaintiffs were already in existence and being used by the Singh family. He also stated that the receipt was issued on 18<sup>th</sup> March 1996 and was issued by the Ministry of Lands. He also stated that the said receipt has never been disowned and that the Plaintiffs are still the rateable owners of the land.

### **The case of the 1<sup>st</sup> and 3<sup>rd</sup> defendants**

16. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed a Statement of Defence dated 21<sup>st</sup> November 2022 which Statement of Defence included a counter-claim seeking several reliefs as enumerated earlier. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants denied that the Plaintiffs were the owners of the suit property. They denied attempting to



enter upon and take possession of the suit property on the 26<sup>th</sup> August 2022. They also averred that they had been in occupation of the suit property since 1996 following the transfer and registration in the name of the 1<sup>st</sup> Defendant. It was also averred that the suit property was duly and lawfully allocated upon the 1<sup>st</sup> Defendant vide an allotment letter dated 12<sup>th</sup> April 1996 and complied with the terms of the letter of allotment culminating into the issuance of a Certificate of Lease/grant on the 11<sup>th</sup> July, 1996.

17. In their Counterclaim, they averred that the Plaintiffs activities on the suit property were illegal and unlawful amounting to trespass. The particulars of trespass were pleaded at paragraph 28 of the Counterclaim.
18. It was also averred that the Plaintiffs certificate of lease was procured and obtained by fraud and misrepresentation for which the Chief Land Registrar was privy or a party to. The particulars of fraud were pleaded and particularised at paragraph 31 of the Counterclaim.
19. During trial, the 1<sup>st</sup> Defendant Alexander Thurania Kaminchia testified on their behalf. He relied on his witness statement filed on 21<sup>st</sup> November 2022 and their bundle of documents dated 18<sup>th</sup> July 2023 in his evidence in chief. He added that he was allocated the suit property and complied with all the conditions set therein. He paid the standard premium and was issued with receipts. He also stated that he conducted a recent search in 2022 which confirmed that the suit property belonged to him. He also stated that he has been paying land rates and land rent of the said property. He also stated that he had paid until the year 2022 but was unable to pay for the year 2023 owing to this dispute. He also stated that he had constructed a mabati structure on the said property though he has been denied access.
20. When cross-examined by counsel for the 2<sup>nd</sup> Defendant he stated that his letter of allotment had a different address which was a KCB address who was his previous employer. He also stated that he was informed by someone that the land was available for allocation though he could not remember the name of that person.
21. On cross-examination by counsel for the Plaintiffs he stated that he has the original letter of allotment which is dated 12<sup>th</sup> April 1996. He also stated that he had a Part Development Plan for the same. He conceded that he did not have a copy of the application letter in Court and neither did he also have the forwarding letter for the said allotment. He also conceded that his acceptance letter was dated 28<sup>th</sup> May 1996 which was after the required time of 30 days. He also stated that he had the original title before Court which title was issued on 11<sup>th</sup> July 1996. He also stated that he had not placed any search between the year 1996 – 2018 and he also did not have in Court the land rent and land rates receipts for the years 1999 -2018. He also stated that he had not undertaken any developments on the said property.
22. When re-examined, he stated that he complied with the conditions for the allotment of the property and that the Government accepted his payments and never issued him with any notice of non-compliance. He also stated that he had not instituted any criminal case against the Plaintiffs.

### **The case of the 2<sup>nd</sup> Defendant**

23. The 2<sup>nd</sup> Defendant filed a Statement of Defence dated 11<sup>th</sup> January 2023 which was a mere denial of the averments made in the Plaint.
24. During trial, Vincencia Juma, a Land Registrar working with the Ministry of Lands, Public Work, Housing and Urban Development testified on behalf of the 2<sup>nd</sup> Defendant. She relied on her witness statement dated 3<sup>rd</sup> day of October 2023 and also produced the 2<sup>nd</sup> Defendant's bundle of documents dated 13<sup>th</sup> June 2023 in her evidence in chief.



25. On cross-examination by Counsel for the Plaintiffs, she stated that the Plaintiffs are the registered owners of the disputed property and that their interest emanated from allocation. She also stated that from their records, the Plaintiffs made a formal application for allocation of the land which application was received by the Ministry. She stated that as per their records the Plaintiffs' application was received on 14<sup>th</sup> February 1996 and 29<sup>th</sup> February 1996 the Plaintiffs received communication and an allotment letter which was formally forwarded to them. She also stated that the Plaintiffs complied with the stipulated conditions within 30 days that was required. She added that the Plaintiffs accepted the allotment and made payment within 30 days and the Ministry of Lands communicated to the Director of Survey confirming their compliance and request for the survey. Subsequently thereafter a deed plan was issued in favour of the Plaintiffs.
26. The witness stated that the 1<sup>st</sup> Defendant's acceptance letter was outside the 30 days period. She also stated that she had no records in her custody for the allocation to Alexander T. Kaminchia.
27. When cross-examined by Counsel for the 1<sup>st</sup> and 3rd Defendants, she stated that she was only aware of one parcel file in existence in respect to the suit property L.R No. 21932.
28. She stated that a title emanates from a deed plan and a deed plan cannot contain two L.R numbers. She also stated that she did not have copies of the 1<sup>st</sup> Defendant's cheque in her bundle.
29. When re-examined she stated that the mode of communication in 1996 by the Ministry was through letters. She also stated that all deed plans have an L.R Number and that a title cannot be issued without a deed plan number.

#### **The Plaintiffs' submissions**

30. The Plaintiffs filed written submissions dated 26<sup>th</sup> January 2024. The Plaintiffs submitted on the following seven issues:
  - i. Who between the Plaintiffs and the 1<sup>st</sup> Defendant acquired valid and enforceable interest on the suit property by way of government allocation?
  - ii. In whose favour between the Plaintiffs and the 1<sup>st</sup> Defendant was the suit property surveyed and a deed plan issued?
  - iii. Who has demonstrated the root title and validity of the title they hold over the suit property?
  - iv. Who is in actual occupation of the suit property,
  - v. Has the 1<sup>st</sup> Defendant proved his allegations of fraud as against the plaintiffs to the required standards.
  - vi. What orders should the court issue to meet the ends of justice
  - vii. Who should bear the costs of the suit and the Counterclaim.
31. The Plaintiffs also filed a comprehensive case digest dated 26<sup>th</sup> January 2024 which the Court has duly considered. The Plaintiffs submitted that they had adduced evidence showing that they were jointly allocated the suit property as an unsurveyed residential plot No. XVII-Langata Nairobi vide a letter of allotment dated 13<sup>th</sup> March 1996 following their formal application vide a letter dated 13<sup>th</sup> February 1996 which was duly received by the Government. It was also submitted that their application and letter of allotment were accompanied by a PDP approved on 15<sup>th</sup> December 1995 by the Commissioner of Lands and the said PDP was produced in evidence tendered by the Plaintiffs and the Chief Land Registrar.



32. The Plaintiffs submitted that the 1<sup>st</sup> Defendant had not availed any evidence before court confirming that they had communicated acceptance of the allotment within the stipulated 30 days. It was also submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not adduce any evidence demonstrating any formal communication between him and the Government over his purported allocation save for his letter dated 28<sup>th</sup> May 1996 which was still out of time. It was also submitted that the implication of failing to meet the conditions set in the purported letter of allotment meant that the offer lapsed by operation of the law. Reliance was placed in the Supreme court case of Torino Enterprises Limited –vs Attorney general (Petition 5(E006 of 2022)[2023] KESC(KLR)(22 September 2023)(Judgement) and Joseph Kamau Muhoro –vs Attorney General & another [2021]eKLR.
33. It was also submitted that the 1<sup>st</sup> Defendant was unable to explain how the government authorized the survey of the suit property and issuance of a deed plan in his favour even before he had communicated his acceptance of the alleged offer and that he had also failed to state how and when his survey was conducted.
34. It was contended that the 1<sup>st</sup> Defendant had not demonstrated a good root to the title of the property because he had relied on a purported grant L.R. No. 69832 that was anchored on deed plan No.204711 which was issued on 30<sup>th</sup> April 1996 being a period before he had communicated his acceptance. It was further contended that there were alarming inconsistencies on ownership documents produced by the 1<sup>st</sup> Defendant.
35. As to who is in actual occupation of the suit property, the Plaintiffs submitted that they took vacant possession of the suit property immediately after they complied with all the conditions in 1996. They had also produced in evidence a photograph taken on 26<sup>th</sup> August 2022 at the suit property which showed that the suit property was surrounded by a perimeter wall and some of the vehicles used by the goons and police officers that attempted to forcibly evict them from the suit property. It was submitted that the 1<sup>st</sup> Defendant was not in occupation of the suit property and had not undertaken any developments in respect to the same.
36. As to whether or not the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had proved the allegations of fraud that were pleaded as against the Plaintiff, it was submitted that during the cross-examination of DW2 he admitted that he had not placed before the court any investigative report that has found anyone culpable of fraud. It was also submitted that during re-examination that he had not lodged any Criminal complaint against the Plaintiffs regarding ownership and occupation of the suit property.
37. Counsel for the Plaintiffs also submitted that the 2<sup>nd</sup> Defendant's witness had tendered evidence confirming that the title and interest held by the Plaintiffs over the suit property originated from the Ministry of Lands pursuant to a lawful allocation and that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants never produced any evidence contrary to the same. Counsel relied on the cases of Philemon L. Wambia –vs Gaitano Lusitsa Mukofu & 2 others [2019]eKLR & Moses Parantai & Peris Wanjiku Mukuru suing as the legal Representatives of the Estate of Sospeter Mukuru Mbeere(deceased) –vs Stephen Njoroge Macharia [2020]eKLR and submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had not met the established standard of proof relating to the allegations of fraud.
38. In conclusion, the Plaintiffs urged the court to allow the Plaintiffs' suit in terms of the Amended Plaint dated 31<sup>st</sup> October 2022 and dismiss the 1<sup>st</sup> and 3<sup>rd</sup> Defendants Counterclaim dated 21<sup>st</sup> November 2022.



### **The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submissions**

39. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed two sets of submissions dated 7<sup>th</sup> January and 25<sup>th</sup> January 2024. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants also filed a comprehensive case digest dated 25<sup>th</sup> January 2024 which the Court has also duly considered.
40. From a perusal of their submissions, the following issues were outlined for consideration by the Court; whether the 1<sup>st</sup> Defendant was lawfully allocated the suit property, who between the 1<sup>st</sup> Defendant and the Plaintiffs acquired valid and enforceable title to the suit property, whether a Certificate of Title could issue in favour of the Plaintiffs long after a Certificate of Title had been generated and issued in favour of the 1<sup>st</sup> Defendant, whether failure to call a witness from the Ministry of Land is fatal to the 1<sup>st</sup> Defendant's case, whether the 2<sup>nd</sup> Defendant who has not amended his/her statement of defence can give evidence which is at variance with his/her statement of defence and whether such endeavours contravene the doctrine of departure.
41. It was submitted that the Plaintiffs had failed to produce a copy of the banker's cheque which was relied upon in making payments and as such they had failed to demonstrate how they acquired the suit property. It was argued that the 1<sup>st</sup> Defendant had produced before court a copy of the banker's cheque which was forwarded to the Commissioner of Lands and which was duly received and receipted and as such he had proved and demonstrated the root of his allotment as well as proof of the validity attendant to the issuance of the said letter of allotment.
42. Relying on the case of Joseph N.K Arap Ng'ok –vs Moiyo Ole Keiwua & 4 others [1997]eKLR, it was submitted that a letter of allotment does not confer any legal interest. On this aspect, it was further submitted that the Plaintiff's title was issued on 17<sup>th</sup> December 2018 while the 1<sup>st</sup> Defendant's Certificate of Title had been issued on 11<sup>th</sup> July 1996 which indeed ought to take precedence over the Plaintiffs.
43. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants also submitted that the 2<sup>nd</sup> Defendant supported the Plaintiffs' claim during trial without filing an Amended Statement of Defence and that the same was at variance with the 2<sup>nd</sup> Defendant's Statement of Defence on record.
44. It was also submitted that failure for the 1<sup>st</sup> Defendant to call a witness from the 2<sup>nd</sup> Defendant's office or Ministry of Lands was not fatal to the 1<sup>st</sup> Defendant's case as had been submitted by the Plaintiff.
45. In respect to the reliefs sought, it was submitted that the 1<sup>st</sup> Defendant is entitled to general damages for trespass of Kshs.20,000,000/- and further that the Plaintiffs claim be dismissed with costs.

### **The 2<sup>nd</sup> Defendant's Submissions**

46. The 2<sup>nd</sup> Defendant filed written submissions dated 7<sup>th</sup> February 2024 and Counsel outlined the following issues for consideration by the Court, whether the parties have demonstrated the validity of the titles they hold over the suit property, whether the 1<sup>st</sup> Defendant had proved fraud on the part of the Plaintiffs and who should bear costs of the suit and Counter-claim.
47. It was submitted that the Plaintiffs had presented evidence to establish due compliance within conditions as to acceptance and payment of the requisite fees within the stipulated 30 days from the date of allocation. The 1<sup>st</sup> Defendant had failed to produce any compliance with the letter of allotment within the 30 days provided hence he cannot claim to have any interest on the property. The supreme court case of Torino Enterprises Limited –vs *Attorney General (Petition 5(E006 of 2022)* [2023] KESC(KLR)(22 September 2023)(Judgment) was cited in support of the same.



48. As to whether the 1<sup>st</sup> Defendant had proved the particulars of fraud on the part of the Plaintiffs, the 2<sup>nd</sup> Defendant submitted that there was no evidence of any criminal complaint against the Plaintiffs that had been lodged and as such the 1<sup>st</sup> Defendant had failed to prove any particulars of fraud on the part of the Plaintiffs.

### **Analysis and Determination**

49. The Court has considered the pleadings, the evidence adduced by the parties and written submissions filed. Each party framed its own issues for determination in their submissions, however the Court has framed the following as the salient issues for determination herein;

- i. Who between the Plaintiffs and the 1<sup>st</sup> Defendant are the lawful proprietors and or owners of the suit property.
- ii. Whether the 1<sup>st</sup> Defendant has proved the allegations of fraud as against the Plaintiffs.
- iii. Whether the testimony of the 2<sup>nd</sup> Defendant's witness ought to be disregarded by the Court having been tendered without any Amended Defence being filed by the 2<sup>nd</sup> Defendant.
- iv. What reliefs if any should be granted in respect to the Plaintiffs suit and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants Counterclaim.

### **Issue No. I- Who between the Plaintiffs and the 1<sup>st</sup> Defendant are the lawful proprietors and/or owners of the suit property.**

50. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
    - (i) requires prompt payment in full, of just compensation to the person; and



(ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.”

51. Both the Plaintiff’s and the 1<sup>st</sup> Defendant are laying claim to the suit property known as L.R No. 21932. Interestingly they are both claiming on the basis of allocation at one point or the other. They are also both claiming to have been in possession of the suit property from the year 1996. They are also both claiming to have ownership documents in relation to the same. The Plaintiffs claim to have a lease dated 12<sup>th</sup> July 2018 and registered on 17<sup>th</sup> December 2018 as well as a Certificate of Title L.R No. 203488 registered on 17<sup>th</sup> December 2018 while the 1<sup>st</sup> Defendant claims to have a grant registered on 11<sup>th</sup> July 1996.

52. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR. Equally in the case of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

53. As earlier stated both parties are laying claim to the suit property. It is trite law that It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

54. Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

55. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea vs David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence



advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

56. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

57. The Court will be guided by the aforementioned provisions and cases. During trial, it emerged that the Plaintiffs jointly made a formal application for the allocation of the suit property through their letter dated 13<sup>th</sup> February 1996 which was received on 14<sup>th</sup> February 1996 attaching the PDP for the allocation area and clearly identifying the plot they were applying for. The said letters were produced in evidence. It also emerged that the suit property at that time of allocation was known as Unsurveyed Residential plot XVII – Langata – Nairobi. Evidence was also adduced to the effect that their joint request was approved by the Government and the same was communicated to them vide the Commissioner of Lands letter dated 29<sup>th</sup> February 1996. It was also evident that subsequently thereafter the Plaintiffs were issued with allotment letter dated 13<sup>th</sup> March 1996. Evidence was also adduced that the Plaintiffs duly complied with the conditions contained in the letter of allotment within the 30 days stipulated period. The Plaintiffs also adduced evidence of how they accepted the offer and forwarded a banker’s cheque of Kshs.540,800/- vide a letter dated 18<sup>th</sup> March 1996 which letter was duly acknowledged and receipt No. D361671 dated 18<sup>th</sup> March 1996 issued. The Plaintiffs also produced in evidence documents showing that the suit property was surveyed and deed plan No.294711 issued in their favour. The said deed plan was issued on 30<sup>th</sup> April 1996. The Plaintiffs Certificate of Title was registered on 17<sup>th</sup> December 2018 after numerous follow ups when their file had disappeared at the Lands office.
58. The 1<sup>st</sup> Defendant on the other hand stated that he was issued with an allotment letter dated 12<sup>th</sup> April 1996 and he duly complied and signed an acceptance letter dated 28<sup>th</sup> May 1996 and was issued with a Certificate of Grant on 11<sup>th</sup> July 1996.



59. Upon analysing the evidence that was adduced herein during trial and further from the documentation and pleadings that were filed by the parties, it is evident that the root of the suit property can be traced from originally being held by Government before its allocation. The evidence before this Court shows that the Plaintiffs allotment letter is dated 13<sup>th</sup> March 1996 and they communicated acceptance and complied with all its conditions vide a letter dated 18<sup>th</sup> March 1996 which was within the stipulated 30 days period. The 1<sup>st</sup> Defendants allotment letter is dated 12<sup>th</sup> April 1996 whose acceptance was made vide his letter dated 28<sup>th</sup> May 1996 which was outside the stipulated period of time.
60. It was the evidence of DW1, Vinecensia Juma the Land Registrar that the suit property was allocated to and in favour of the Plaintiffs vide an allotment letter dated 13<sup>th</sup> March 1996. DW1 also averred that the Plaintiffs also had an approved Part Development Plan (PDP). She also testified that as per their records the Plaintiff accepted the offer and complied with all the conditions within the stipulated period of 30 days. She also testified that the allocation of the suit property to the Plaintiffs was lawful and legitimate as per the records held by the 2<sup>nd</sup> Defendant.
61. The 1<sup>st</sup> Defendant testified as having been allocated the suit property vide allotment letter dated 12<sup>th</sup> April 1996 however from the evidence on record, there was no acceptance and compliance by the set conditions as at 12<sup>th</sup> May 1996.
62. Having considered the said evidence, there is no gain saying that the Plaintiffs were duly and lawfully allocated the suit property which allocation was underpinned by their letter of allotment dated 13<sup>th</sup> March 1996. The Plaintiffs also timeously complied with the terms and conditions thereof which terms required acceptance of the Letter of offer within 30 days and payments of statutory levies within 30 days.
63. In respect to allotment letters, the law is settled to the effect that only once a letter of allotment is issued and the terms thereon accepted, that title comes into existence. The Supreme Court of Kenya in the case of *Torino Enterprises Limited vs Attorney General (Petition No. 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)* stated that;
- “It is settled law that an allotment letter is incapable of conferring interest in land, being nothing than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr. Joseph N. K. Arap Ng’ok vs Justice Moijo Ole Keiyua & 4 Others C.A 60 of 1997 (unreported)* and in *Gladys Wanjiru Ngancha vs Teresa Chepsaat & 4 Others High Court Civil Case No. 182 of 1992 [2008] eKLR*, the superior courts restated this principle...”
64. The 1<sup>st</sup> Defendant’s acceptance and payment was made outside the stipulated 30 days. It is trite law that where the terms of a Letter of allotment are neither adhered to nor complied with timeously, the impugned letter of allotment is rendered redundant and becomes otiose. In the case of *Joseph Kamau Muhoro versus The Attorney General & Another (2021)eKLR* the Court stated:
- “Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.
- In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of *Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR*; “In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for



Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive."

65. The letter of allotment does not last indefinitely. There must be an acceptance of the offer to allot the land within the stipulated duration by the allottee fulfilling the conditions specified for the said allotment. In view of the foregoing, it is the finding of this Court that once the Plaintiffs duly complied with the conditions of the letter of allotment on 18<sup>th</sup> March 1996, they acquired an interest in the property and the same was not available for allocation to another entity. Hence therefore the said property could not have been available for allocation to the 1<sup>st</sup> Defendant on 12<sup>th</sup> April 1996. The 1<sup>st</sup> Defendant also did not comply within the set conditions within the required 30 days. Reliance is placed to the case of Augustine Thuo –vs James Maina Thuita & another [2020]eKLR where the court stated as follows:-

“The property was not available for allocation as it had already been allocated to the Plaintiff. The allocation of the property to the 1<sup>st</sup> Defendant was in the circumstances null and void”

66. In view of the foregoing, it is the finding of this Court that indeed, the Plaintiffs are the bonafide and legal owners of the suit property.

**Issue No. II Whether the 1<sup>st</sup> Defendant has proved the allegations of fraud as against the Plaintiffs.**

67. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants pleaded particulars of fraud as against the Plaintiffs and 2<sup>nd</sup> Defendant in their Counterclaim dated 21<sup>st</sup> November 2022. The same were particularized at paragraph 31 as follows:-

Particulars of Fraud as against the Plaintiffs

- i. Misleading the Chief Land Registrar that same had been issued with a lawful and valid allotment.
- ii. Faking and forging documents to acquire registration of the suit property.
- iii. Procuring a Certificate of lease by false pretence.
- iv. Inducing and corruptly acquiring the impugned Certificate of Title.
- v. Attempting to defraud the Counter claimer lawful rights to land in respect to the suit property.
- vi. Forging the signatures of the relevant Land Registrars' and pretending that the said signatures were/are lawful and authentic.

Particulars of fraud on the part of the Chief Land Registrar

- i. Conniving with the Plaintiffs to generate and issue the fraudulent Certificate of lease.
- ii. Preparing and issuing a Certificate of Lease in the absence of a valid and letter of allotment
- iii. Corruptly preparing and signing a Certificate of Lease contrary to and in contravention of the provisions of the *Land Registration Act*.
- iv. Acting in consonance with fraudsters and cartels to defraud the Counter-claimer of lawful rights over the suit property.



68. Fraud Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment".

69. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held:

"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities".

Similarly, the Court of Appeal decision in the case of John Kamunya & Another v John Nginyi Muchiri & 3 Others [2015] eKLR held that:

"We find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."

70. To succeed in claiming fraud the Plaintiffs not only need to plead but also particularized it by laying out water tight evidence which the Court would consider. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved

71. During the hearing of the suit, the 1<sup>st</sup> Defendant herein admitted in cross-examination that he had not lodged any criminal complaint against the plaintiffs neither did he adduce any evidence to controvert the testimony of the Land Registrar that the Plaintiffs documents were fraudulent and or acquired in a fraudulent manner.

72. In the instant case, upon analysing the evidence that was tendered herein it is the finding of this Court that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have not tendered sufficient evidence that prove the particulars of fraud as against the Plaintiffs and the 2<sup>nd</sup> Defendant to the satisfaction of the Court and this court agrees with the submissions made by the Plaintiffs and the 2<sup>nd</sup> Defendant on this issue that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have failed to discharge this burden.

**Issue No. 111 - Whether the testimony of the 2<sup>nd</sup> Defendant's witness ought to be disregarded for want of an Amended Defence being filed by the 2<sup>nd</sup> Defendant.**

73. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the 2<sup>nd</sup> Defendant never filed any Amended defence and that during trial the 2<sup>nd</sup> Defendant's witness gave evidence in support of the Plaintiff's case and as such the same should not be considered by this court.

74. Vincencia Juma a Land registrar testified on behalf of the 2<sup>nd</sup> Defendant during the hearing of this suit. From the evidence that was tendered the said witness testified as an expert witness working as a Land Registrar with the Ministry of Lands, Public Housing and Urban Development.

75. The status of experts' evidence was dealt with in Shah and Another vs. Shah and Others [2003] 1 EA 290 where the Court expressed itself as follows:

"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to



foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in Court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony... The opinion of the expert witness is not binding on the Court, but is considered together with other relevant facts in reaching a final decision in the case and the Court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the Court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the Court to reach its own opinion.”

76. However, when all is said and done, as was held by the Court of Appeal in Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it, as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

77. On the weight a Court of law should attach on expert opinion, the Court in the case of Stephen Kinini & Another v The Ark Limited [2016] eKLR held that,

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for Court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the Court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account.”

78. The purpose of trial is to determine the validity of the allegations. The objective being to secure a fair and impartial trial. Hence therefore the court cannot disregard the testimony of an expert witness on the sole basis that a party calling such witness had not filed an amended defence to reflect his or her testimony. In view of the foregoing the 1<sup>st</sup> and 3<sup>rd</sup> defendants’ objection to the testimony of the 2<sup>nd</sup> Defendant’s witness has no basis and the same fails owing to the reasons aforementioned.

**Issue No. IV - What reliefs should be granted if any in respect to the Plaintiffs’ suit and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants’ Counterclaim.**

79. Both the Plaintiffs and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have sought for reliefs touching on and concerning ownership of the suit property. The Court has found and held that the Plaintiffs are the lawful and bonafide owners of the suit property. To this extend the Plaintiffs have established and proved their



case as pertains to ownership of the suit property to the required standard. They are therefore entitled to the reliefs sought in their amended plaint.

80. In respect to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants Counterclaim, it is worth noting that a Counterclaim just like any other suit ought to be proved to the required standard. The Court having found that the Plaintiffs are the lawful and bonafide owners of the suit property it therefore follows that the orders sought by the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's in their Counterclaim cannot be granted. This Court cannot grant the reliefs sought in the Counterclaim as there is no basis in granting the same and as such the 1<sup>st</sup> and 3<sup>rd</sup> Defendants Counterclaim is hereby dismissed.
81. In respect to costs, the costs are at a discretion of the court. As a general rule costs follow the event unless the Court for good reason orders otherwise. In the present case, the Plaintiffs having succeeded in their claim they are entitled to costs of the suit and Counterclaim which shall be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

### **Final Orders**

82. In conclusion, based on the totality of the evidence tendered herein, the Plaintiffs have been able to prove their case against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to the required standard and the same is hereby allowed in terms of prayers (a), (b), (c) and (d) of their amended plaint dated 31<sup>st</sup> October 2022. The counterclaim filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants dated 21<sup>st</sup> November 2022 is hereby dismissed. The Plaintiffs are also awarded costs of the suit and the Counterclaim which shall be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

Judgement accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2024.**

**E.K WABWOTO**

**JUDGE**

In the presence of:-

Mr. Rapando holding brief for Mr. Odunga for Plaintiffs.

Mr. Miruka for 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

No appearance for 2<sup>nd</sup> Defendant.

Court Assistant: Caroline Nafuna.

